INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain the jurisdiction	1
Statutes of the State, the validity of which is involved	2
Date of judgment and date of application for appeal	5
Nature of the case and rulings of the Supreme Court of Ohio	6
Cases believed to sustain the jurisdiction of the United States Supreme Court to review the judgment of the Supreme Court of Ohio on appeal	9
The questions involved are substantial	10
Statutory provisions and issues	10
Appellant's contentions	13
Facts	13
The law believed applicable	14
Exhibit "A"—Order of the Tax Commissioner	25
Exhibit "B"—Order of the Board of Tax Appeals in No. 9568	27
Exhibit "C"—Order of the Board of Tax Appeals in No. 9569	28
Exhibit "D"—Opinion of the Supreme Court of Ohio	30
Exhibit "E"—Certificate as to federal question	39

Table of Cases Cited

Air-Way Corp. v. *Day*, 266 U. S. 71	20
Alpha Portland Cement Co. v. *Mass.*, 268 U. S. 203	19
Beidler v. *South Carolina*, 282 U. S. 1	18
Buck v. *Beach*, 206 U. S. 392	15
Butler Bros. v. *McColgan*, 315 U. S. 501	9
Charleston Federal Savings & Loan Assn. v. *Alderson*, 324 U. S. 82	9

Page

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77 ..... 9, 16, 23
Cudahy Co. v. *Hinkle*, 278 U. S. 460 20
Delaware, Lackawanna & Western R. R. Co. v. *Pa.*, 198 U. S. 341 15
Department of Banking v. *Pink*, 317 U. S. 264 6
International Paper Co. v. *Mass.*, 246 U. S. 135 20
Looney v. *Crane Co.*, 245 U. S. 178 20
Louisville, etc., Ferry Co. v. *Kentucky*, 188 U. S. 385 15
Newark Fire Ins. Co. v. *State Board of Tax Appeals*, 307 U. S. 313 ..... 15, 17
Southern Natural Gas Corp. v. *Alabama*, 301 U. S. 148 9
Tradesmens National Bank v. *Oklahoma Tax Commission*, 309 U. S. 560 9
Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 15
Wallace v. *Hines*, 253 U. S. 66 21
Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1 20
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193 ..... 15, 16, 17, 19

STATUTES CITED

American Jurisprudence, Volume 51, Section 463 15
Constitution of the United States, 14th Amendment 7

General Code of Ohio:
Section 5325-1 11
Section 5328-1 ..... 2, 4, 9, 10
Section 5328-2 ..... 2, 5, 9, 10
Section 5498 ..... 2, 3, 9, 10

United States Code, Title 28, Section 1257 (Public Law No. 773—80th Congress, Second Session) 1, 2

BLEED THROUGH – POOR COPY

IN THE SUPREME COURT OF OHIO

OCTOBER TERM, 1948

No. 31080

UNITED STATES GYPSUM COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio,
Appellee.

JURISDICTIONAL STATEMENT

United States Gypsum Company, appellant in the above entitled cause and applicant for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of Ohio, respectfully represents that the basis upon which appellant contends that the United States Supreme Court has jurisdiction upon appeal to review the final judgment herein is as follows:

I

The Statutory Provision Believed to Sustain the Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Title 28, United States Code, Section 1257 (Public Law No. 773—80th

Congress, Second Session), which section reads in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There is drawn in question in this suit the validity of statutes of the State of Ohio on the ground of repugnancy to the Constitution of the United States. The decision of the Supreme Court of Ohio, which is the highest court of Ohio in which a decision in this suit could be had, was in favor of the validity of such statutory provisions.

II

Statutes of the State, the Validity of Which Are Involved

The statutes of the State of Ohio, the validity of which are involved, and which have been sustained by the final judgment of the Supreme Court of Ohio, as not being repugnant to the Constitution of the United States, are Sections 5498, 5328-1 and 5328-2 of the General Code of Ohio.[1]

These statutes as construed and applied by the Supreme

---

[1] There is no official edition of the General Code of Ohio, Section 5498 appears on page 139 of Page's Ohio General Code Annotated, Volume 4-A; and at page 86, Throckmorton's Ohio Code Annotated, Volume 1, Part Second, 1940 Edition. Sections 5328-1 and 5328-2, General Code of Ohio, appear on pages 17, 18, and 19 of Page's Ohio General Code Annotated, Volume 4-A; and at page 9, Throckmorton's Ohio Code Annotated, Volume 1, Part Second, 1940 Edition.

BLEED THROUGH – POOR COPY

Court of Ohio authorize and require allocation to Ohio, as Ohio property, for purposes of the franchise tax computation, receivables of appellant, a non-resident of Ohio, having no domiciliary or business situs in the State. The pertinent statutory provisions are as follows:

> "*Section 5498.* After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued, and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divided into

two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

"In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of sections 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

"On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation."

"*Section 5328-1* . . . Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, . . . shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, . . . shall not be subject to taxation. . . .

• • • • • • •

BLEED THROUGH – POOR COPY

"*Section 5328-2.* Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

• • • • • • •

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

III

Date of Judgment and Date of Application for Appeal

The date of judgment of the Supreme Court of Ohio which is sought to be reviewed is August 4, 1948. An application for rehearing, subsequently filed within the

time allowed by law and considered by the Supreme Court of Ohio, was denied by that court on October 6, 1948. The judgment herein thereupon became final for the purpose of appeal and review by the Supreme Court of the United States on October 6, 1948. *Department of Banking* v. *Pink*, 317 U. S. 264, 266.

The date on which the application for appeal is presented is December 23, 1948.

IV

Nature of the Case and Rulings of the Supreme Court of Ohio

The nature of the case and the rulings of the Supreme Court of Ohio deemed to bring the case within the jurisdictional provisions relied on are as follows:

The controversy out of which this suit arose concerns the action of the Tax Commissioner of Ohio in treating as Ohio property for franchise tax purposes receivables of appellant, an Illinois corporation. Appellee included said accounts receivable as Ohio property in the numerator of the property fraction in determining appellant's franchise tax for the years 1938 to 1943 inclusive, and assessed additional corporation franchise tax against appellant based thereon for the years in question. Appellant objected to such assessments in the time and manner provided by law, and at the hearing before the appellee urged the constitutional objection now in issue. In affirming the assessments on November 17, 1944, the appellee ruled that as to such constitutional issue he had no authority to set aside acts of the legislature on constitutional grounds. A copy of the Order of the Tax Commissioner is appended hereto as Exhibit "A".

Appellant then appealed to the Board of Tax Appeals of Ohio in the time and manner provided by law, again

BLEED THROUGH – POOR COPY

drawing in question the validity of the statutes upon the authority of which the assessments were based, on the ground of repugnancy to the Fourteenth Amendment of the Constitution of the United States. The Board of Tax Appeals on April 10, 1947, affirmed the action of the Tax Commissioner for the reasons set forth in the entry in case No. 9569 (Case No. 31081 in the Supreme Court of Ohio), involving an *ad valorem* tax assessed by appellee on account of the same receivables. In Case No. 9569, referred to above, the Board of Tax Appeals held that it had "no right to declare a statute unconstitutional." A copy of the entry of the Board of Tax Appeals in this case (No. 9568) is appended hereto as Exhibit "B", and an excerpt from the entry of the Board of Tax Appeals in Case No. 9569, showing disposition of the constitutional issues raised, is appended hereto as Exhibit "C".

Appellant then appealed to the Supreme Court of Ohio in the time and manner provided by law, including in its notice of appeal and assignment of errors the following:

> "7. The Board erred in failing to hold that Section 5498 and Sections 5328-1 and 5328-2 of the Ohio General Code, to the extent that they determine such accounts receivable of appellant to be property owned or used in Ohio, were in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, . . . and were therefore invalid."

The Supreme Court of Ohio affirmed the decision of the Board of Tax Appeals on August 4, 1948, the court holding that the statutes, as construed and applied by the appellee, are not repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. Appellant thereafter on August 18, 1948, filed its application for rehearing, which was denied October 6, 1948. The

Supreme Court of Ohio decided appellant's case at the same time, and in the same opinion, that it decided four companion cases, No. 31038 (also involving the statutes imposing a franchise tax based on the allocation of intangibles to Ohio), and Nos. 31037, 31079, and 31081, involving the statutes imposing *ad valorem* taxes on intangibles. The four companion cases, one of which involved an *ad valorem* tax on accounts receivable of this appellant, involved like constitutional issues under facts having a broad general similarity. A copy of the opinion of the Supreme Court of Ohio is appended hereto as Exhibit "D".

It will be observed that in its opinion of August 4, 1948, the Supreme Court of Ohio discussed the constitutional issues only in that portion of the opinion dealing with one of such companion cases decided at the same time and by the same opinion. In order to clarify its holding on the constitutional issues as to the appellant in this case the Supreme Court of Ohio, on November 10, 1948, entered and filed as a part of the record herein its certificate that in appellant's notice of appeal to the Supreme Court of Ohio the validity of Sections 5498, 5328-1 and 5328-2 of the General Code of Ohio was drawn in question, upon the ground that such statutory provisions, to the extent that they determined appellant's accounts receivable to be property owned or used in Ohio, are unconstitutional in that they deprive appellant of its property without due process of law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; and further, that the question as to the validity of such statutory provisions was urged upon the Supreme Court of Ohio in briefs and arguments of counsel, that the determination of the constitutionality of said statutes was necessary to a decision of the case, and that the Supreme Court of Ohio decided in favor of the validity of said statutes. A copy of said cer-

BLEED THROUGH – POOR COPY

tificate of the Supreme Court of Ohio is appended hereto as Exhibit "E".

As shown by its opinion referred to above, and in its certificate filed in this case, the Supreme Court of Ohio held that as applied by the appellee herein Sections 5498, 5328-1 and 5328-2 of the General Code are valid and are not repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

V

Cases Believed to Sustain the Jurisdiction of the United States Supreme Court to Review the Judgment of the Supreme Court of Ohio on Appeal.

In cases decided by the United States Supreme Court where the question has been as to the validity of a State taxing statute (including statutes imposing franchise or excise taxes), and the decision of the State court has been in favor of its validity, the review has been by way of appeal from the judgment of the State court.

Southern Natural Gas Corp. v. *Alabama,* 301 U. S. 148 (1937);

Connecticut General Life Ins. Co. v. *Johnson,* 303 U. S. 77 (1938);

Tradesmens National Bank v. *Oklahoma Tax Commission,* 309 U. S. 560 (1940);

Butler Bros. v. *McColgan,* 315 U. S. 501 (1942).

See also: *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 82 (1945).

VI

The Questions Involved Are Substantial

1. *Statutory Provisions and Issues.*

The central issue in this case involves the jurisdiction of the State of Ohio to include as Ohio property in the computation of the corporate franchise tax, intangibles of a nonresident in the absence of a domiciliary situs or a business situs in Ohio. The issues raised by this case are of the broadest import and application, and if the decision of the Supreme Court of Ohio is not reversed, will result in a complete reversal of the doctrine of situs of intangibles for such purposes as heretofore established by the Supreme Court of the United States.

The Tax Commissioner of Ohio, appellee herein, determined that with respect to the years 1938 to 1943, inclusive, appellant owned Ohio property consisting of notes and accounts receivable as follows:

Year	Receivables
1938	$ 617,570
1939	620,460
1940	846,940
1941	1,034,800
1942	1,343,320
1943	935,530

The Tax Commissioner assessed additional franchise taxes against appellant based upon the treatment of such receivables as Ohio property under the purported authority of Sections 5498, 5328-1 and 5328-2 of the General Code of Ohio.

Section 5498 sets forth the method for determining the value of the issued and outstanding shares of stock of a

BLEED THROUGH – POOR COPY

corporation and the allocation of such value to Ohio for franchise tax purposes. Under that section one-half of the value of the stock is multiplied by a fraction known as the "property fraction," whose numerator is the fair value of all the corporation's property "owned or used by it in Ohio," and whose denominator is the value of all its property, wherever situated. As stated above, the Tax Commissioner, under the purported authority of the statutory provisions in question, included appellant's said receivables in the numerator of the property fraction as Ohio property, which action gives rise to the present controversy.

Section 5328-1 provides that property of the kinds and classes mentioned in Section 5328-2 (which includes notes and accounts receivable)

> "*used in and arising out of* business transacted in this state by, for or on behalf of a nonresident person, . . . shall be subject to taxation; and all such property of persons residing in this state *used in and arising out of* business transacted outside of this state by, for or on behalf of such persons, . . . shall not be subject to taxation." (Italics supplied.)

Section 5325-1 defines "used in business," as well as "used," and "business," as follows:

> "Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, . . . Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for

> gain, profit or income and extends to personal service occupations."

The complete phrase, "used in . . . business transacted in this state," which appears in Section 5328-1 quoted above, is not defined by Section 5325-1 or by any other statutory provision.

Section 5328-2 of the General Code of Ohio sets forth the circumstances under which accounts receivable shall be deemed to *arise* out of business transacted in Ohio, as follows:

> "Property of the kinds and classes herein mentioned, when used in business, shall be considered to *arise* out of business transacted in a state other than that in which the owner thereof resides in the bases and under the circumstances following:
>
> "In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state." (Italics supplied.)

Appellant contends that under the uncontroverted facts in this case it is abundantly clear that appellant's receivables have neither a domiciliary situs nor a business situs in Ohio. In rendering its decision the Supreme Court of Ohio necessarily held that, even though the goods (with minor exceptions) were manufactured from day to day only to fill orders previously received and were shipped immediately thereafter, the sales were nevertheless from a "stock of goods" within the meaning of Section 5328-2 of the General Code of Ohio, and therefore constituted property "owned or used by" appellant in Ohio.

BLEED THROUGH – POOR COPY

2. *Appellant's Contention.*

Appellant contends that the State of Ohio has no constitutional power to allocate to itself as Ohio property for franchise tax purposes, receivables of a foreign corporation which have no domiciliary situs or business situs in Ohio, with the result that Sections 5498, 5328-1 and 5328-2 of the General Code of Ohio, as construed and applied, are repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

3. *Facts*

The essential facts in this case, which were stipulated in part and in part based on the testimony of witnesses, are not in dispute and, to the extent covered by the stipulation of facts, are summarized by the Supreme Court of Ohio as follows:

> "This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago

> or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere."

In addition to the facts summarized above, the record discloses that all of appellant's products (with minor exceptions) are manufactured only to fill orders already in hand and are not manufactured for stock or inventory purposes at any time, plant output fluctuating from day to day with the volume of orders. The bulky character of the products in question necessitates immediate shipment, no provision being made in appellant's plants for warehousing or storing of completed products, and railroad switch tracks and other loading facilities being located in close proximity to the actual end point of the manufacturing processes to facilitate immediate loading and shipment without rehandling. The function of carrying or maintaining a stock of goods in this industry is performed by the building material dealer, who normally purchases in carload lots and carries such stocks to fill day to day requirements of the contractor or other consumer or user of such products.

4. *The Law Believed Applicable*

> The statutes in question as applied are repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.
>
> (a) The power to impose an ad valorem tax, whether on tangibles or intangibles, is limited to property within the territorial jurisdiction of the State.

It is axiomatic that the State is wholly lacking in power to tax property not within its territorial jurisdiction.

BLEED THROUGH – POOR COPY

Louisville, etc. Ferry Co. v. *Kentucky,* 188 U. S. 385 (1903);
Delaware, Lackawanna & Western R. R. Co. v. *Pa.,* 198 U. S. 341 (1905);
Union Refrigerator Transit Co. v. *Kentucky,* 199 U. S. 194 (1905);
Buck v. *Beach,* 206 U. S. 392 (1907);
Wheeling Steel Corp v. *Fox,* 298 U. S. 193 (1936);
51 Am. Jur., *Taxation,* Section 59.

With respect to intangibles, the location or situs for tax purposes is the owner's domicile, following the maxim *mobilia sequuntur personam* (*Wheeling Steel Corp* v. *Fox,* 298 U. S. 193 (1936); 51 Am. Jur., *Taxation,* Section 463), unless the intangibles have acquired a *business situs* in another state (*Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193 (1936); *Newark Fire Ins. Co.* v. *State Board of Tax Appeals, et al.,* 307 U. S. 313 (1939)).

The rule that property not within the territorial jurisdiction of the taxing power may not be subjected to tax therein is grounded primarily upon the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall "deprive any person of . . . property, without due process of law."

In *Delaware, Lackawanna and Western Railroad Company* v. *Pennsylvania,* 198 U. S. 341 (1905), the Supreme Court held unconstitutional a Pennsylvania property tax on capital stock represented in part by tangible personal property outside the state, saying at page 358:

> "The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

And in the leading case of *Wheeling Steel Corp.* v. *Fox*, 298 U. S., 193 (1936), the court, speaking of the property tax on intangibles involved in that case, said at pages 208-209:

> "We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing State. . . . We have said that the application to the States of the rule of due process arises from the fact 'that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution.' . . ."

The court in that case held the accounts receivable of the taxpayer, a Delaware corporation, to have a business situs in West Virginia, and therefore subject to tax in that state, under facts precisely the reverse of the factual situation now before this court with respect to the State of Ohio. As appellant's accounts receivable clearly have neither a domiciliary situs nor a business situs in Ohio the Legislature cannot constitutionally impose a property tax upon such intangibles for, in the words of the United States Supreme Court in *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S., 77 (1938), the court will

> '. . . look to the State power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a State which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them but the due process clause denies to the State power to tax or regulate the corporation's property and activities elsewhere."

(b) Appellant's accounts receivable have neither a domiciliary situs nor a business situs in Ohio, and therefore

BLEED THROUGH – POOR COPY

are not within the territorial jurisdiction or taxing power of the State of Ohio.

Lack of a domiciliary situs is not controverted. Intangibles only acquire a business situs in a state other than the domicile of the owner when the owner conducts a localized, or separate, semi-independent or self contained business in such state and the intangibles are so connected with and used in such localized business as to become an integral part thereof. (*Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193 (1936); *Newark Fire Ins. Co.* v. *State Board of Tax Appeals,* 307 U. S. 313 (1939).

In the leading case of *Wheeling Steel Corp* v. *Fox,* 298 U. S. 193 (1936), the United States Supreme Court, after citing a number of earlier cases applying the business situs doctrine, said at page 210:

> "These cases, we said in *Farmers Loan and Trust Co.* v. *Minnesota, supra,* p. 213, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become intergral parts of some local business.' "

The necessity of finding a localized use of the intangibles sufficient to make them an integral part of the localized business as a basis for taxation outside the domiciliary situs, was reaffirmed by the United States Supreme Court in *Newark Fire Ins. Co.* v. *State Board of Tax Appeals,* 307 U. S. 313 (1939). In that case the court, after adverting to the rule of *mobilia sequuntur personam,* said at pages 319-21:

> "There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state. . . .
>
> "Where consideration has been given to the existence of a business situs of intangibles for taxation by

a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. . . .

". . . To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

From the facts in this case, with respect to which there is no dispute, appellant contends that there is nothing to connect its receivables with a localized business in Ohio. A finding of business situs must be based upon evidence, and where constitutional rights are affected it is the province of the Supreme Court of the United States to inquire into such evidence. (*Beidler* v. *South Carolina*, 282 U. S. 1). The record discloses that appellant solicits orders in Ohio for acceptance or rejection in *Illinois*, and carries on manufacturing operations at several locations in Ohio, but that is all. Its sales of products to be manufactured, its corporate proceedings, its accounting, its collections, and all the various steps or processes necessary to complete the conduct of a business are localized in Illinois. The accounts receivable, which originate from sales of products manufactured in Ohio and sold in many States, are not integrated, even in the slightest degree, with appellant's activities in Ohio. They do not arise out of contracts made in Ohio and their creation is controlled exclusively in Illinois. They are put to no use anywhere excepting to be collected and their collection, as well as the application of their proceeds, is controlled in Illinois. The proceeds are not segregated in application so as to be identified in any way with Ohio activities.

The elements necessary to create a business situs in Ohio are entirely absent in this case, the situation presented being precisely the converse of that which was before the

BLEED THROUGH – POOR COPY

United States Supreme Court in *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193 (1936). As applied to the State of *Illinois*, the facts are in all material respects substantially identical with those which the Supreme Court in the *Wheeling Steel* case held were sufficient to give rise to a business situs in West Virginia. ***But with respect to the State of Ohio these facts are the precise opposite.*** Despite the controlling decision of the Supreme Court of the United States in the *Wheeling Steel* case, the Supreme Court of Ohio in this case has reached a directly contrary holding upon substantially similar facts.

(c) A franchise tax statute which apportions capital stock to the State on the basis of property having no situs in the State, seeks to tax property outside the jurisdiction of the taxing power and is *unreasonable, arbitrary, and void.*

An attempt to impose an ad valorem tax on property outside the jurisdiction of the taxing State violates the due process clause of the Fourteenth Amendment of the Constitution of the United States and is therefore void (See 4(a) supra, and cases cited). And what a State cannot do directly it cannot do indirectly under the guise of a franchise tax. Thus, in *Alpha Portland Cement Co.* v. *Mass.* 268 U. S. 203 (1925), the court said at page 218:

> "It must now be regarded as settled that a State may not * * * tax property beyond her borders under the guise of regulating or taxing intrastate business * * * the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction."

It has long since been established that a franchise tax measured by the value of *all* the capital stock without ap-

line. The court held this allocation basis invalid in that "valuable terminals • • • are in other States" and, further, that "bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State." In the course of its opinion the court, speaking through Mr. Justice Holmes, also said at page 69:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State."

In other words, the court in *Wallace* v. *Hines, supra,* held that to make assessments which distorted the apportionment fraction by allocating to the state property situated elsewhere resulted in an unconstitutional excise tax. In this case the Supreme Court of Ohio has sustained appellee's asserted right to do that which the United States Supreme Court in *Wallace* v. *Hines, supra,* held to be unconstitutional —namely to allocate to Ohio, as Ohio property, accounts receivable of appellant which do not have either a domiciliary situs or a business situs in Ohio. In *Wallace* v. *Hines,*

BLEED THROUGH – POOR COPY

supra, it was unlawful to allocate to North Dakota a value representing in part terminal properties situated in other states; in the present case it is equally unlawful to allocate to the state of Ohio a value representing accounts receivable having a situs outside of Ohio and having no situs of any kind in Ohio. In the words of Mr. Justice Holmes, it cannot

> "be seen in (any) plain and fairly intelligible way that it (the value of such accounts receivable) adds to the value of * * * the rights exercised in the State."

This attempted allocation of such accounts receivable to Ohio is clearly arbitrary and unreasonable, and necessarily results in a valuation for franchise tax purposes which bears no reasonable relationship to the value of the franchise. That no valid distinction exists between an improper allocation of one type of property as against another is also borne out by *Wallace* v. *Hines, supra*, where the court found equally offensive the attempted allocation to the state of bonds owned by the taxpayer. It is not material whether the property consists of real estate, tangible personal property, or intangible personal property—the same principles apply whenever the state attempts to tax directly, or indirectly in the guise of a franchise tax, property which has a situs outside the boundaries of the taxing jurisdiction, and has no situs within such taxing jurisdiction.

See also *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77 (1938), where the Supreme Court held that premiums upon reinsurance contracts made outside the State of California, although relating to insurance risks within the State, could not be used as a basis for determining the franchise tax of a foreign corporation licensed to do business in the State.

Appellant respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257 of Title 28 of the United States Code.

Dated, this 23rd day of December, 1948.

CHARLES M. PRICE,
CLIFFORD C. PRATT,
JOSEPH A. DUBBS,
CLARENCE D. LAYLIN,
Attorneys for Appellant,
United States Gypsum Company.

SCOTT, MACLEISH & FALK,
EAGLESON & LAYLIN,
Of Counsel.

BLEED THROUGH – POOR COPY

EXHIBIT "A"

DEPARTMENT OF TAXATION OF OHIO

No. 1652

Nov. 17, 1944.

In the Matter of the Application of THE UNITED STATES GYPSUM COMPANY, CHICAGO, ILLINOIS, for Review and Correction for the Years 1938 to 1943, Inclusive

The application of the United States Gypsum Company, Chicago, Illinois, for review and correction of additional franchise tax assessments for the years 1938 to 1943, inclusive, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that part of the assessments complained of imposed additional franchise taxes upon the applicant in that certain accounts receivable were given an Ohio situs for the purpose of determining the proper proportion of the value of the applicant's stock for franchise tax purposes whereas the applicant had not allocated any of its receivables into Ohio for such purpose except as to the years 1938 and 1939.

The Tax Commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph v. Evatt, 142 O. S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the determinations as heretofore made by this department with respect to allocating the item of accounts receivable were in every respect proper.

The applicant at the time of said hearing contested the validity of such determinations with respect to allocating to Ohio certain of its accounts receivable on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5328-1 and 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the 14th amendment to the Constitution of the United States and the Constitution of the State of Ohio for, as construed, such sections operate to tax intangible property of a non-resident over which Ohio has

no jurisdiction and which has no business situs in Ohio. As to such contention, the Tax Commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds.

In addition to the foregoing contention the applicant at the time of said hearing also claimed that such determinations as heretofore made were illegal and erroneous in that certain of the accounts receivable, as allocated to Ohio, did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. The Tax Commissioner finds that such accounts receivable did result from the sale of property from a stock of goods maintained in Ohio and such contention is accordingly denied.

In view of the foregoing, it is, therefore, the order of the Tax Commissioner that the application for review and correction be and the same is hereby denied.

DEPARTMENT OF TAXATION,
WILLIAM S. EVATT,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

WILLIAM S. EVATT,
Tax Commissioner.

BLEED THROUGH - POOR COPY

EXHIBIT "B"

BEFORE THE BOARD OF TAX APPEALS,
DEPARTMENT OF TAXATION OF OHIO

Apr. 10, 1947.

No. 9568

UNITED STATES GYPSUM COMPANY, *Appellant*,

v.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, *Appellee*

Entry

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an additional corporation franchise tax assessment made against it for the years 1938 to 1943, both inclusive, totaling $6,900.04. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts, the evidence and briefs of counsel.

It is claimed by the appellant that the tax commissioner erred in including certain accounts receivable in the numerator of the property fraction for the purpose of determining the base upon which the fee provided for in Section 5499 of the General Code should be computed.

The stipulation of facts and the evidence which were introduced in the appeal by this appellant from a personal property tax, being No. 9569, were introduced as a part of the record in this case. The facts were fully set forth in that case and need not be repeated here. As in this case, the situs of accounts receivable resulting from sales of goods manufactured and shipped from its Ohio plants was involved. The questions involved in both cases are identical since in determining the amount or value of accounts receivable the tax commissioner must be guided by the provisions of sections 5328-1 and 5328-2, General Code. Consequently, this Board must follow the same rule in this case as it followed in the personal property tax assessment case

No. 9569. For the reasons set forth in the entry in that case, to which reference is hereby made, the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this State and, consequently, that the tax commissioner did not err in including them in the numerator of the property fraction in computing the franchise tax.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

(Signed) EDWARD KERWIN,
Secretary.

EXHIBIT "C"

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION OF OHIO

April 10, 1947.

No. 9569

UNITED STATES GYPSUM COMPANY, *Appellant,*

v.

WILLIAM S. EVATT, Tax Commissioner of Ohio, *Appellee*

Entry

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an additional intangible personal property tax assessment made by him against the appellant consisting of notes or accounts receivable for the years 1942 and 1943. This cause was heard and submitted upon the transcript of the proceedings before the

BLEED THROUGH – POOR COPY

tax commissioner, the stipulation of facts, the evidence and briefs of counsel.

* * * * * * *

It is claimed, however, that to apply this rule to non-residents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. Hillsborough Township *v.* Cromwell, 90 L. Ed. 298; Schwartz *v.* Essex County Board of Taxation, 129 N. J. L. 129, affirmed 130 N. J. L. 177.

* * * * * * *

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

EDWARD J. KIRWIN,
Secretary.

EXHIBIT "D"

No. 31037

NATIONAL DISTILLERS PRODUCTS CORP., *Appellant*,

v.

GLANDER, Tax Commissioner, *Appellee*

No. 31038

NATIONAL DISTILLERS PRODUCTS CORP., *Appellant*,

v.

EVATT, Tax Commissioner, *Appellee*

No. 31079

WHEELING STEEL CORP., *Appellant*,

v.

GLANDER, Tax Commissioner, *Appellee*

No. 31080

UNITED STATES GYPSUM CO., *Appellant*,

v.

EVATT, Tax Commissioner, *Appellee*

No. 31081

UNITED STATES GYPSUM CO., *Appellant*,

v.

EVATT, Tax Commissioner, *Appellee*

Appeal from the Board of Tax Appeals

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the State of Ohio. Of the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia corporation,

BLEED THROUGH – POOR COPY

one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

No. 31037 and No. 31038, Mr. Isadore Topper, for appellant, and Mr. Hugh S. Jenkins, attorney general, and Mr. Daronne R. Tate, for appellee.

No. 31079, Messrs. Dargusch, Caren, Greek and King, for Appellant, and Mr. Hugh S. Jenkins, attorney general, and Mr. Daronne R. Tate, for appellee.

No. 31080 and No. 31081, Mr. Charles M. Price, Mr. Clifford C. Pratt, Mr. Joseph A. Dubbs and Mr. Clarence D. Laylin, for appellant, and Mr. Hugh S. Jenkins, attorney general, and Mr. Daronne R. Tate, for appellee.

Per Curiam:

These cases were presented together for the reason that all five of them involve similar questions of situs under the provisions of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. Aluminum Co. of America *v.* Evatt, Com'r., 140 Ohio St., 385; Proctor and Gable Co. *v.* Evatt, Com'r., 142 Ohio St., 369; Ransom and Randolph Co. *v.* Evatt, Com'r., 142 Ohio St., 398; Haverfield Co. *v.* Evatt, Com'r., 143 Ohio St., 58; Kettering, Inc., *v.* Evatt, Com'r., 144 Ohio St., 419; National Cash Register Co. *v.* Evatt, Com'r., 145 Ohio St., 597; American Rolling Mill Co. *v.* Evatt, Com'r., 147 Ohio St., 207.

Section 5325-1, General Code, reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with

ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"• • • Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code • • • shall be subject to taxation • • •."

Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, connected with, sent from, or reporting to any officer or at any office located in such other state. • • •

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes

BLEED THROUGH – POOR COPY

mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its stockholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton County, Ohio. It sells its products in every state where such products may be sold legally. Payroll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured by the com-

pany at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York and were subject to acceptance or rejection at the New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matter as follows:

> "The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is 'a state other than that in which the owner thereof resides' and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—, in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable, or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the tax commissioner."

The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due process and equal protection clauses of the state and federal constitutions. However, this question was

squarely and properly decided in the recent case of Parke, Davis & Co. v. Atlanta, 200 Ga. 296, in which the first and fourth paragraphs of the syllabus read as follows:

> "1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to non-resident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the non-resident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. • • •
>
> "4. Where a non-resident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state."

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location of its principal office and place of business where all meetings of the shareholders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four

manufacturing plants are operated in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Payrolls are prepared and payroll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part: "It is clear that under this statute (Section 5328-1, General Code) intangibles owned by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here. • • •

"Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). • • •

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of National Distillers Products Corporation v. Glander, No. 11118, decided by this board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from

BLEED THROUGH – POOR COPY

a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state and, consequently, are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions, arose out of business transacted in this state and are, therefore, taxable."

The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales

offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

In its opinion the Board of Tax Appeals reached the following conclusion:

> "The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of National Distillers Products Corporation v. Glander, No. 11118 decided by this board on March 12, 1947, and the case of Wheeling Steel Corporation v. Glander, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also the case of National Distillers Products Corporation v. Glander, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio."

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

Affirmed.

Weygandt, C. J. Turner, Matthias, Hart, Zimmerman, Sohngen and Stewart, JJ., concur.

EXHIBIT "E"

SUPREME COURT OF OHIO

No. 31080

UNITED STATES GYPSUM COMPANY, *Appellant*,

vs.

WILLIAM S. EVATT, Tax Commissioner of Ohio, *Appellee*

Appeal from the Board of Tax Appeals

Certificate

On motion of appellant, United States Gypsum Company, this Court orders it to be certified and made a part of the record of the proceedings and the judgment of affirmance in this case that in its Notice of Appeal to this Court from the Board of Tax Appeals appellant drew in question the validity of Sections 5498, 5328-1 and 5328-2 of the General Code of Ohio, upon the ground that said statutory provisions as construed and applied, to the extent that they determined appellant's accounts receivable to be property owned or used in Ohio, are unconstitutional in that they deprive appellant of its property without due process of law, contrary

to the Fourteenth Amendment of the Constitution of the United States; and that the question of the validity of said statutory provisions as set forth in said Notice of Appeal was urged upon the Court herein in the briefs and arguments of counsel for appellant; that a determination of the validity of said statutory provisions under the due process clause of the Fourteenth Amendment of the Constitution of the United States was necessary to a decision of this case, and that after giving due consideration to this question this Court was of the opinion, and so decided, that said statutory provisions are valid and not repugnant to the Constitution of the United States.

Witness, the Honorable, the Supreme Court of Ohio, this 10th day of November, 1948.

SUPREME COURT OF OHIO,
(Signed) CARL V. WEYGANDT,
Chief Justice of the Supreme Court of Ohio.